

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

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 FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

In the Matter of)	
)	
Amendment of Section 2.106 of the)	
Commission's Rules to Allocate)	ET Docket No. 95-18
Spectrum at 2 GHz for Use)	
by the Mobile-Satellite Service)	

REPLY COMMENTS OF U.S. WEST COMMUNICATIONS, INC.

U S WEST Communications, Inc. ("U S WEST"), pursuant to Section 1.415(c) of the Commission's Rules, hereby submits its reply to comments filed in response to the *Memorandum Opinion and Order and Third Notice of Proposed Rule Making and Order* in ET Docket No. 95-18 ("*MO&O/Third NPRM*"), in which the Commission has proposed to reallocate 40 MHz of spectrum in the 2110-2150 MHz band for fixed and mobile services and the licensing of that spectrum pursuant to competitive bidding.^{1/} In particular, U S WEST supports the proposed flexible allocation for a variety of fixed and mobile services, and agrees with those commenters who urge the Commission to adopt licensing and service rules that permit the greatest flexibility in the use of this spectrum. Thus, U S WEST strongly opposes the views of those parties who both advocate limiting

^{1/} See *Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service*, ET Docket No. 95-18, FCC 98-309 (rel. Nov. 25, 1998). In an *Order* released on January 19, 1999, the deadline for the submission of reply comments in this proceeding was extended to March 5, 1999. See *Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service*, ET Docket No. 95-18, DA 98-179 (rel. Jan. 19, 1999).

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the use of 2110-2150 MHz solely for future “third generation” (“3G”) wireless services, and suggest restricting licensee eligibility only to existing cellular and PCS providers.

Specifically, U S WEST agrees with the comments of Wireless Communications Association International, Inc. (“WCA”) and Cisco Systems, Inc. (“Cisco”) endorsing the flexible allocation of spectrum in the 2110-2150 MHz band for fixed and mobile services and the adoption of a flexible regulatory framework to govern the licensing and use of that band in a manner consistent with domestic and international spectrum allocations.^{2/} WCA and Cisco correctly point out that the public interest supports allowing licensees the greatest possible flexibility in meeting marketplace demands for new services.^{3/}

The benefits of flexible use in spectrum allocations have been recognized by Congress and were codified in the Communications Act when Congress adopted a new Section 303(y) as part of the Balanced Budget Act of 1997 (the same law which also mandates the reassignment of the 2110-2150 MHz band).^{4/} Subsequent to the enactment of Section 303(y), the Commission has repeatedly recognized that the public interest strongly favors flexible use; for example, when it adopted service rules for the 39 GHz bands, the Commission noted that “[i]t is in the public interest to afford []

^{2/} See Comments of the Wireless Communications Association International, Inc., ET Docket no. 95-18 (filed Feb. 3, 1999)[hereinafter cited as “WCA Comments”]; Comments of Cisco Systems, Inc., ET Docket no. 95-18 (filed Feb. 3, 1999)[hereinafter cited as “Cisco Comments”].

^{3/} See WCA Comments at 5-7; Cisco Comments at 2.

^{4/} See 47 U.S.C. § 303(y), adopted in the Balanced Budget Act of 1997, Pub. L. No. 105-33, § 3005, 111 Stat. 251, 268 (1997). Section 303(y) authorizes the Commission to allocate spectrum so as to provide flexible use, if such use is consistent with international agreements and the Commission finds that: “(A) such an allocation would be in the public interest; (B) such use would not deter investment in communications services and systems, or technology development; and (C) such use would not result in harmful interference among users.” *Id.*

licensees flexibility in the design of their systems to respond readily to consumer demand for their services, thus allowing the marketplace to dictate the best uses for this band.”^{5/} The Commission has in recent years consistently embraced this pro-competitive principle when allocating spectrum for new services.^{6/} Contrary to the suggestions of some commenters, there is no reason for a departure from that principle here.

Cisco and WCA are correct that flexibility in the proposed allocation is essential to fostering competition in the telecommunications marketplace so as to promote the offering of broadband services that are in such great public demand.^{7/} The directive of Section 706 of the Telecommunications Act of 1996 to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans”^{8/} can be satisfied, as Chairman

^{5/} See *Amendment of the Commission’s Rules Regarding the 37.0-38.6 GHz and 38.6-40 GHz Bands*, 12 FCC Rcd 18,600, 18,633-34 (1997).

^{6/} See *Rulemaking to Amend Parts 1, 2, 21 and 25 of the Commission’s Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, 12 FCC Rcd 12545, 12637-12638 (1997); *Amendment of the Commission’s Rules Regarding the 37.0-38.6 GHz and 38.6-40 GHz Bands*, 12 FCC Rcd 18,600, 18,633-34 (1997); *Amendment of the Commission’s Rules to Establish Part 27, the Wireless Communications Service*, 12 FCC Rcd 10785, 10841-65 (1997); *Allocation of Spectrum Below 5 GHz Transferred From Federal Government Use*, 11 FCC Rcd 624, 633 (1995).

^{7/} See WCA Comments at 5 ; Cisco Comments at 2.

^{8/} *Telecommunications Act of 1996*, Pub. L. No. 104-104, Title VII, § 706, 110 Stat. 153 (1996) (“The Commission ... shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans ... by utilizing, in a manner consistent with the public interest, convenience and necessity, ... measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.”). See also *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the*

Kennard acknowledged just last week, by “allocating large blocks of spectrum in ways that make them useable for any technically feasible service.”^{9/} Similarly, in the recent *Advanced Telecommunications Incentives Report* issued pursuant to Section 706, the Commission made clear its plan to “continue to allocate, auction, and license more spectrum for uses that include broadband, especially facilities that serve the last mile and last hundred feet.”^{10/} Adoption of the flexible use allocation proposed in the *MO&O/Third NPRM* is a strong step in the right direction.

This is not to say that the proposed allocation must be reserved exclusively for broadband services. In this regard, U S WEST agrees with the Personal Communications Industry Association (“PCIA”) to the extent that it urges the Commission to ensure that this spectrum is compatible for use with 3G services.^{11/} By adopting a sufficiently flexible framework for this spectrum allocation, the Commission can appropriately leave the decisions on the future uses of this spectrum to the market, which is best suited to ascertain whether broadband, 3G or other fixed or mobile services

Telecommunications Act of 1996, CC Docket No. 98-146 FCC 99-5 (rel. Feb 2, 1999) [hereinafter cited as “*Advanced Telecommunications Incentives Report*”]. U S WEST has long made clear that it subscribes to policies that promote investment in advanced telecommunications infrastructure by avoiding unnecessary regulation of competitive services and by eliminating rules that discourage investment and deployment of advanced telecommunications infrastructure. See, e.g., Reply Comments of U S WEST Communications, Inc., CC Docket No. 98-146, at 1 (filed Oct. 8, 1998).

^{9/} “Statement of William E. Kennard Before the United States Senate Committee on the Judiciary Subcommittee on Antitrust, Business Rights and Competition on State of Competition in the Telecommunications Industry Three Years After Enactment of the Telecommunications Act of 1996,” at 10 (Feb. 25, 1999).

^{10/} *Advanced Telecommunications Incentives Report*, at ¶ 107.

^{11/} See Comments of the Personal Communications Industry Association, ET Docket No. 95-18, at 2 (filed Feb. 3, 1999) (“PCIA urges the Commission to ensure that this spectrum can be used for third generation wireless services.”).

would be highest use of this band. As Gregory L. Rosston and Jeffrey S. Steinberg have explained in their seminal work on spectrum policy, *"Using Market-Based Spectrum Policy to Promote the Public Interest:"*

In general, the public derives the greatest benefit from spectrum when the spectrum is used for services that the public values most highly and therefore is most willing to pay for. No government agency, however, can reliably predict public demand for specific services or the future direction of new technologies. Even if technology and the public's needs were unchanging, a central planner can only imprecisely evaluate the benefits of the myriad possible uses of spectrum and determine which frequencies should be used for each service. ...

...except in instances of substantial market failure or overriding public interest considerations, the Commission should avoid mandating that spectrum be used to provide specific services (e.g., two-way switched mobile voice, paging or dispatch). The Commission should also endeavor to minimize regulations governing how services may be provided, which limit competition, obstruct innovation, and impede efficient investment...^{12/}

In short, the Commission should refrain from imposing restrictions on the use of the 2110-2150 MHz band so that there are no artificial constraints that would preclude the use or uses which meet the public's most-pressing needs.

For these reasons, U S WEST strongly disagrees with the comments filed by Telephone and Data Systems, Inc. ("TDS") and the Wireless Communications Division of the Telecommunications Industry Association ("WCD") to the extent that they seek to restrict the permissible use of this band exclusively to broadband Personal Communications Services ("PCS") or future 3G services (such as International Mobile Telecommunications-2000 ("IMT-2000")) to the exclusion of all other,

^{12/} Gregory L. Rosston and Jeffrey S. Steinberg, *Using Market-Based Spectrum Policy to Promote the Public Interest*, 50 Fed. Comm. L.J. 87, 92-3 (1997) [hereinafter cited as "*Spectrum Policy*"].

possibly better, uses.^{13/} IMT-2000 services hold great promise and may well prove to be the best and highest use of this band. Nevertheless, the Commission properly observed in *MO&O/Third NPRM* that the 2110-2150 MHz band “spectrum could ... be efficiently utilized for a number of services,”^{14/} and the initial round of comments bears this out. It would be a mistake for the Commission to accept the invitation of TDS and WCD and be drawn into dictating in advance a particular use of this band.

WCD makes much of the adoption by the ITU of an international footnote which states that the 2110-2150 MHz band is “intended for use, on a worldwide basis,” by countries seeking to implement IMT-2000. However, WCD conspicuously avoids mentioning that the same footnote makes clear that “[s]uch use does not preclude the use of these bands by other services to which these bands are allocated”^{15/} And WCA is directly on point when points out that, contrary to WCD’s suggestions, the reservation of the 2110-2150 MHz band exclusively for 3G would do little to harmonize the U.S. 3G allocation with domestic allocations for IMT-2000.^{16/}

Similarly, U S WEST is strongly opposed to WCD’s proposal that the auction rules “should limit participation to PCS and cellular operators who intend to deploy systems that will deliver 3G services to consumers.”^{17/} Leaving aside the fact that the highest and best use of the 2110-2150 MHz

^{13/} See Comments of Telephone and Data Systems, Inc., ET Docket No. 95-18, at 2 (filed Feb. 3, 1999)[hereinafter cited as “TDS Comments”]; Comments of the Wireless Communications Division of the Telecommunications Industry Association, ET Docket No. 95-18, at 2 (filed Feb. 3, 1999) [hereinafter cited as “WCD Comments”].

^{14/} *MO&O/Third NPRM* at ¶ 30.

^{15/} *Id.* at n. 63.

^{16/} See WCA Comments at 8-10.

^{17/} WCD Comments at 6.

band may not be for 3G services, WCD's proposed eligibility restriction is built on the weak premise that these licensees likely will be the sole providers of 3G services to American consumers. U S WEST disagrees with this analysis. While PCS and cellular providers may well upgrade their current system assets to provide 3G offerings, this is no reason to prohibit new entrants from the 3G market. Such a narrow restriction on licensee eligibility would clearly eliminate competition in the award of 2110-2150 MHz licenses and would prevent market forces from efficiently distributing that spectrum. Quite simply, eligibility restrictions make poor public policy, as Messrs. Rosston and Steinberg have correctly observed:

Promotion of competition should also be a principal consideration motivating the establishment of rules for assigning spectrum to individual users. In particular, the Commission should strive to reduce barriers to entry by eliminating restrictions on eligibility wherever possible. The Commission generally should not impose eligibility restrictions unless they are clearly necessary to prevent a party from developing or retaining market power (i.e., the ability to control or significantly influence price). Furthermore, whenever possible the Commission should consider less restrictive measures than eligibility restrictions to achieve this end. For example, allowing flexibility across a wide range of spectrum and increasing the supply of spectrum available to the market would reduce both the barriers to entry and the need for eligibility restrictions.^{18/}

An artificial, protectionist eligibility restriction, such as that proposed by WCD, would run counter to the principles of technological neutrality and competition that Chairman Kennard has identified as necessary ingredients of Commission policy in satisfying Americans' "ever more voracious appetite for data transmission capacity."^{19/}

^{18/} See *Spectrum Policy* at 97-8.

^{19/} See "Chairman William E. Kennard Receives Alliance for Public Technology Pioneer Award; Outlines Guidelines for Bandwidth," *News Release* (rel. Feb. 27, 1998). In that address, Chairman Kennard laid out seven guideposts for creating competition that are worth recalling here. The Commission should keep these principles in mind when crafting rules for the 2110-2150 MHz

Finally, US WEST disagrees with WCD's assertion that auctions where licenses are afforded maximum flexibility have been less successful than those where the uses have been narrowly tailored. In particular, WCD cites the Wireless Communications Service ("WCS") auction and last year's postponement of an auction of five 5 MHz blocks of spectrum in the General Wireless Communications Service ("GWCS") as support for its call for limiting the use of the 2110-2150 MHz band.^{20/} WCD's analysis simply misses the mark here. As the Commission has explained, revenue shortfalls in the WCS auction were due for the most part not to flexible use, but to statutory

band:

1. Competitive provision — The best way to ensure more bandwidth is to encourage local competition, by having as many providers as possible competing to deploy faster access.
2. Incumbents as well as new entrant — We should give incumbents the flexibility to deploy high-bandwidth services, while ensuring that new entrants are able to provide competitive facilities or services into the home.
3. Technological neutrality — We should try not to pick winners between competing technologies which best meet user needs in each locale.
4. Community-building — We must ensure the availability of high-bandwidth connections not only to businesses, but homes, schools, and health care facilities across America, and giving these users as wide a choice of providers as possible, will help to lower the cost of providing services.
5. Common sense — We want to eliminate rules that may hinder possible providers — whether incumbents or newcomers — from deploying high bandwidth facilities and services and that do not create a level playing field for completion, build opportunities, or protect consumers.
6. Competition as a path to deregulation — As users substitute new services based upon bandwidth, economic regulation of traditional services can be lifted.
7. Incentives for efficient investments — Government should provide a sensible, clear framework based upon sound economic principles that gives the private sector the confidence to invest in new-bandwidth technologies.

Id.

^{20/} See WCD Comments at 12-13.

deadlines established by Congress and technical limitations imposed on WCS to protect adjacent channel satellite operations.^{21/} Similarly, the FCC's postponement of the GWCS auction last year was due to similar statutory deadlines, technical limitations posed by the channelization scheme and possible severe interference from military uses of adjacent bands, not from flexible use.^{22/} Notably absent from WCD's analysis is any mention of last year's Local Multipoint Distribution Service auction which awarded flexible use licenses and netted over \$578,000,000.00 for the U.S. Treasury.^{23/}

The proper measure of success for spectrum auctions should not, however, be revenues, but success in bringing competitive services to the public. Some industry observers believe that PCS did not establish itself as a full-blown competitor until 1998, three years after the first PCS licenses were auctioned.^{24/} On this basis, it is simply too early to judge the more recent WCS and LMDS auctions, although there are indications that licensees have been investing in the development of new

^{21/} See *FCC Report to Congress on Spectrum Auctions*, WT Docket No. 97-150, FCC 97-353, at 35 (rel. Oct. 9, 1997).

^{22/} See "Comment Sought on Reserve Prices or Minimum Opening Bids for the General Wireless Communications Service (GWCS) in the 4660-4685 MHz Band," *Public Notice*, DA 98-162 (rel. Jan. 30, 1998). Attachment A to the that *Public Notice* for the first time advised potential bidders that interference from U.S. Navy war games frequencies both above and below the GWCS band could affect as many as 90 of the 175 total EAs, or 450 of the 875 GWCS licenses to be offered. See *id.* In addition, regulatory uncertainties existed as a result of petitions for reconsideration that had been filed in 1995, but not resolved as of the date of the auction postponement, seeking reconsideration of a number of issues in the *Second Report and Order* in ET Docket 94-32, which established service rules for GWCS.

^{23/} See "LMDS Auction Closes," *Public Notice*, DA 98-572 (rel. Mar. 26, 1998).

^{24/} See, e.g., Global Wireless Communications Industry, Goldman Sachs Investment Research, at 23 (Feb. 1999).

technologies and formulating ideas for the uses of these bands.^{25/} In short, there is little support for WCD's belief that too much flexibility in the service definition results in poor spectrum usage and weak auction revenues.

In sum, U S WEST agrees with the Commission that the 2110-2150 MHz band should be allocated for co-primary fixed and mobile services in a manner that permits full flexibility, without limiting the band to any particular types of services or restricting eligibility to particular entities.

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March 5, 1999

^{25/} See, e.g., "WCS Radio Could be 3rd SDARS Player," *Communications Daily*, at 2 (Dec. 8, 1998) (describing plans by WCS licensees to launch satellite DARS service); "Nextlink Becomes Biggest LMDS Operator in \$832.7 Million Deal," *Communications Daily*, at 2 (Jan. 15, 1999) (reporting on Craig McCaw-backed Nextlink Communications, Inc.'s acquisition of LMDS licenses and plans to rollout CLEC services by end of year 2000). Indeed, U S WEST is confident that, had incumbent local exchange carriers, such as U S WEST, not been restricted from holding A Block LMDS licenses, that auction would have been much more successful.

CERTIFICATE OF SERVICE

I, Deanna L. Susens, hereby certify that Reply Comments were served this 5th day of March, 1999, by depositing a true copy thereof with the United States Postal Service, first-class postage prepaid, addressed to the following:

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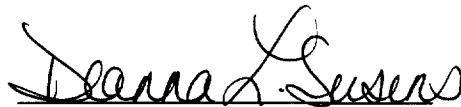
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